Hector Rojas v. U.S. General Accounting Office

Docket No. 92-03

Date of Decision: May 20, 1993

Cite as: Rojas v. GAO (en banc) (5/20/93)

Before: Personnel Appeals Board, en banc (Alan S. Rosenthal, Chair; Nancy A. McBride, Vice Chair; Isabelle R. Cappello and Leroy D. Clark, Members) [1]

Discrimination Based on National Origin

Discrimination

Race

Race Discrimination

Disparate Treatment

Reopening and Reconsideration of Initial Decision

Effect of GAO's Regulations

Reprisal/Retaliation For Protected EEO Activity

Hearing Procedures

Decision

This matter is before the Board pursuant to the provisions of the General Accounting Office Personnel Act (GAOPA), as amended, 31 U.S.C. §732 et seq. (1988), and the Board's Rules at 4 CFR §28.98(b)(3).

I. PROCEDURAL HISTORY

Petitioner is a Band II Specialist in the Natural Resources Management Issue Area [2] of the Resources, Community and Economic Development Division [3] of Respondent, United States General Accounting Office. [4] On April 21, 1991, Petitioner, represented by the Board's General Counsel, filed a Petition for Review alleging that the Respondent had committed prohibited personnel practices by excluding Petitioner from numerous meaningful assignments because of his race (Hispanic) and age, and due to retaliation because of an earlier discrimination complaint filed by him. [5] Petitioner alleges that, because of Respondent's actions in excluding him from meaningful assignments, his competitiveness is severely restricted, and thus, his promotion potential and access to bonuses are impaired.

As relief, Petitioner is requesting a retroactive promotion to GS-15 (Band III), compensatory damages in the amount of $10,000, and any additional make-whole relief the Board deems appropriate.

On May 14, 1991, Respondent filed its Answer to the Petition for Review. Respondent denied the allegations of discrimination and retaliation. As affirmative defenses, Respondent asserted that Petitioner's allegations with respect to his exclusion from any projects from 1986 to 1988 are time barred, because Petitioner has failed to allege facts sufficient to show a continuing violation, and that Petitioner is not entitled to compensatory damages because his claim is not covered by the Civil Rights Act of 1991.

The evidentiary hearing on the merits in this matter was conducted on September 14, 16, 18, 23 and 25, 1992. The parties submitted prehearing and posthearing briefs.

On April 2, 1993, the parties were served with the Initial Decision in which the Petition for Review was dismissed. As to the retaliation claim, the Initial Decision held that a prima facie case was not established by Petitioner. As to the discrimination claim, the decision held that Petitioner failed to establish by the preponderance of the evidence that GAO's reasons for its challenged actions were pretextual.

On April 9, 1993, the Board served a notice on the parties that it proposed to reconsider the Initial Decision on its own motion, pursuant to 4 CFR §28.87(d). The parties were also advised that this action by the Board did not obviate their right to file a request for reconsideration pursuant to 4 CFR §28.87(b). The parties did not avail themselves of this right within the 30 days allowed by the Board's rules. However, after the 30-day period had passed, Petitioner filed a Motion For Leave To File Out Of Time (A Brief In Support of Reconsideration) Where The PAB Has Sua Sponte Ordered Reconsideration And To Reopen The Record. By Order dated May 10, 1993, the Board denied the motion for failure to demonstrate good cause for not complying with the 30-day period to request reconsideration of an initial decision.

Pursuant to 4 CFR §28.87(d), the Board has reconsidered the Initial Decision, on its own motion, and replaces it with this Decision. Although agreeing with the Initial Decision insofar as it dismisses the Petition for Review for failure of proof, the Board is of the view that a clearer and fuller exposition of the facts is needed to support this conclusion. The Board also finds that there are statements as to the applicable law, in the analysis portion of the Initial Decision, that might mislead parties in future cases.

II. CONTENTIONS OF THE PARTIES

A. Petitioner's Contentions

Petitioner contends that Respondent excluded him from numerous meaningful assignments in his area of expertise. Petitioner identifies with particularity the project involving the Mining Law of 1872, for which he was well qualified but to which Respondent assigned him only a very minor role. He alleges that Respondent denied him the opportunity to work on this project because of discrimination and retaliation. He argues that he was available to work on this project well before its completion. He alleges that, because RCED management intentionally excluded him from all but a very minor role at the end of the Mining Law of 1872 project, the staff assigned to the project was deprived of his expertise and, as a result, made numerous errors in its end product, the Mining Law Report, which caused Respondent to be subjected to serious criticism.

Petitioner further argues that, because management excluded him from substantive work on the Mining Law of 1872 project, he was prevented from being competitive for promotions and awards. Petitioner contends that Respondent's argument, that there was no need to involve a mining engineer on the Mining Law of 1872 project, is shown to be pretextual by the fact that Respondent's staff consulted with mining engineers and minerals examiners from other agencies on several occasions during the project, while never

once consulting with Petitioner, who is a mining engineer with significant experience as a minerals examiner.

Petitioner contends that he has shown that Respondent's actions were taken against him because of his race (Hispanic) and national origin (Chilean),[6] as well as in retaliation for a discrimination complaint Petitioner had previously filed against Respondent.

B. Respondent's Contentions

Respondent contends that race and national origin were not the basis for, or any factor in, staffing the Mining Law of 1872 project, and that Respondent's actions in staffing the project were legitimate and nondiscriminatory and were based upon the needs of the project and the resources available to perform the project. Respondent contends that Petitioner was not assigned to the Mining Law of 1872 project because of the following reasons, all deemed by Respondent to be nondiscriminatory: (1) Given the priorities and techniques of the Mining Law of 1872 project, the skills of a mining engineer were not required for the study; (2) Petitioner was unavailable for the Mining Law of 1872 project, because he was on a congressional detail when the Mining Law of 1872 project was staffed, and he did not return to NRM until shortly before the field audit phase of the project was completed; (3) The field audit phase of the project was properly assigned to Respondent's San Francisco Regional Office (SFRO), where it was adequately staffed with evaluators; and (4) After the report on the project had been drafted by the SFRO, it was submitted, in accordance with standard GAO procedure, to NRM for final drafting, which is the responsibility of senior management. Respondent further contends that errors in the Mining Law Report are irrelevant and that, in any event, the witnesses who testified as to the existence of errors were either biased or not competent to testify on the question of errors.

III. FINDINGS OF FACT[7]

1. Petitioner is a Hispanic, born in Chile. (TR 61 and PE 2). In 1965, he received a Bachelor of Science degree in mining engineering from Texas Western College. (TR 61-62 and JE 4a, ´ 4). In 1964, he took some courses that gave an overview of the Mining Law of 1872. (TR 62-63 and JE 4A, ´4). He has worked as a foreman in a Chilean mine. (TR 62). From 1973 to 1978, he worked at the Bureau of Land Management[8] where he received intensive training in connection with all areas of the Mining Law of 1872. (TR 64-65). His family owns some small mines in Chile. (TR 853).

2a. Petitioner was employed by GAO in 1979. (RE 16 amd TR 816). He was hired by Douglas McCullough, who was the Deputy Director of the agency's former Energy and Minerals Division.[9] Mr. McCullough hired Petitioner with the intent to merge his specialized skills as a mining engineer into the auditing functions within GAO so that he would basically work on the teams as an auditor,[10] an investigator, a reviewer and an author. (TR 621). He was to be involved in all phases of the audit, including the drafting of reports. (TR 622-623).

b. Petitioner was hired as a GS-14 and classified as a General Engineer from 1979 to 1982. (JE 4A, ´2).

3. In 1982, the E&M Division became a part of RCED and Petitioner was reclassified as an Evaluator at this time. (JE 4A, ´2).

4. When Petitioner was hired in the 1970s, the energy issue area was "very big and very important" to GAO. (TR 813). In 1982 or 1983, Petitioner started to get fewer and fewer jobs. (TR 69 and 839).

5. In 1985, Petitioner received a performance appraisal with which he disagreed. (TR 71-72). Based on the 1985 appraisal, and the fact that he felt that GAO had consistently underevaluated his work, he instituted a proceeding against GAO in which he alleged discrimination. (TR 72).

6a. In 1986, in connection with discussions about settlement of the discrimination complaint, GAO reclassified Petitioner's position from Evaluator to Mining Engineer. (PE 6, page 2; TR 843, 610 and 813-815). The reclassification was at the request of Petitioner, who did not wish to do any more evaluator-type work. (TR 844).

b. Petitioner's supervisors since 1986 have been James Duffus III and Robert Wilson. (TR. 603 and 326). They were told to use Petitioner only as a mining engineer, not as an evaluator. (TR 610 and 397). Petitioner has declined to accept assignments that he considers to be evaluator-type work. (TR 396-397 and 591).

c. Among the duties enumerated on Petitioner's job description as a mining engineer are: serving as a "consultant and/or working member of audit teams involved with mineral and natural resource reviews"; providing "issue area managers with advice and guidance on minerals and mining engineering considerations related to ... individual audit assignments"; and preparing "responses to inquiries regarding reviews related to mining engineering. The sources of such inquiries are Congress ... and internal management." (JE 2).

d. Mr. McCullough, himself a mining engineer (TR 619), opined that this job description reflects very closely the duties and responsibilities of the job of mining engineer which he created when he hired Petitioner. (TR 623-624).

7. A congressional detail of Petitioner ended in 1986. (TR 122-123). Upon his return, he was assigned work on a nuclear waste job, which he considers one of his "best assignments"; one that represented a "[v]ery intensive" learning experience; one that was a serious challenge to his education and training as a mining engineer. (TR 122-124). He spent a minimum of 126 working days on this job. (RE 1, at pages 1-2). Following this job, he was given several tasks relating to coal issues. (TR 381 and 383).

8a. On October 16, 1986, the Comptroller General received a letter from Congressman Nick J. Rahall II, Chairman of the Subcommittee on Mining and Natural Resources of the House Committee on Interior and Insular Affairs. (TR 383 and RE 8). The letter requested that GAO answer a number of questions related to hardrock reclamation and to some of the mechanics of the mining law, specifically the patenting process and the annual assessment process. (Ibid.) In addition, Congressman Rahall requested that GAO look at the non-mining use of mining claims. (Ibid.) Sometime late in 1986 or early 1987, Robert Wilson considered how to break down this large request into more manageable jobs. (TR 400-401). Mr. Wilson is the Assistant Director in NRM within RCED. (TR 309). In this position, he has been responsible for hardrock mining issues at GAO since 1987. (TR 375).

b. Ultimately, the Rahall letter generated three assignments. (TR 383-384). The first one consisted largely of a series of questionnaires submitted directly to various agencies for their response. (TR 338).

c. The second one is "at the center of the gravamen in this case". See page 5 of Petitioner's Post- Hearing Brief. (It is referred to as the "mining law job" and will be so referred to henceforth.) The mining law job involved a review of certain provisions of the Mining Law of 1872 with regard to land use policies. (TR 336). Its purpose was to review the requirement that claim holders perform a minimal amount of development-related work annually, as well as the act's patent provisions, to determine whether they promote the diligent development of mineral resources and conform to current national natural resource policies. (JE 1, page 2). This purpose grew out of congressional concern that, over the last 117 years, the federal government had sold about 3.2 million acres of public land under the patent provisions of the law. (Ibid.) In 1986, it had sold, under patent, 17,000 acres for $42,500; weeks later, the patent holders sold these lands to major oil companies for $37 million. (Ibid.) Counsel for Petitioner, during oral arguments, stated that: "The Mining Law of 1872 assignment was a review of the law and not of mining engineering principles...." (TR 54).

d. The third assignment involved non-mining uses that were being made of mining claims. (TR 401).

9. On April 17, 1987, Petitioner's discrimination complaint concerning his 1985 performance appraisal was settled. (PE 6, page 2). He had not asked for money, only for an explanation of his performance appraisal and a letter of apology. (TR 72). Because the four persons involved in the contested appraisal had been transferred out of the division by this time, Petitioner felt that he "did not have a case". (Ibid.) Therefore, he settled for "a letter saying that we are going to work well, and that was the end of the case." (Ibid.) GAO also paid the attorney fees incurred by Petitioner. (TR 72-73).

10. Petitioner's appraisal for the period from June 15, 1986 to June 15, 1987, included his work on the nuclear waste job. (PE 11 and TR 420). The appraisal noted that there was a limited demand for Petitioner's expertise in his group during the past year. (Ibid.) Petitioner considered the appraisal to be less favorable than he deserved. (TR 160-163 and RE 1, page 2). He requested from management a detailed explanation of the reasons why he did not receive an "exceptional [the highest rating possible] in every critical element on that job." (TR 162-163). On June 5, 1987, Petitioner refused to sign the rating. (PE 11, Part IV).

11a. On June 10, 1987, Petitioner met with his supervisors, Robert Wilson and James Duffus III. Mr. Duffus is the Director of the Natural Resources Issue Area. (TR 600). Mr. Wilson is one of the assistant directors on the staff of Mr. Duffus. (TR 601). Mr. Wilson is Petitioner's first-line supervisor. (TR 611).

b. Petitioner requested the meeting to talk about his concerns over his 1986-1987 appraisal. (TR 611). At this meeting, Petitioner told his two superiors that he had had "some discussions with the Hill staff, and that a request could be coming in asking for him to be detailed." (TR 612).

12. A request did come to GAO from Senator James McClure in a letter dated June 10, 1987. (RE 2). The request specifically asked for Petitioner and was arranged through a legislative assistant to the Senator, Carl Haywood. (RE 2 and Tr 644-645). In the fall of 1986, Petitioner was introduced to Mr. Haywood by some staff members on the Energy and Natural Resources Committee as "probably the only person on the GAO staff that had a background in minerals and mining." (TR 644). In June 1987, when Senator McClure was beginning an investigation of the molybdenum mining industry, Mr. Haywood recommended that Petitioner be detailed to work on the investigation. (TR 644-645). Mr. Haywood called Petitioner and talked to him once or twice about working for him. (TR 645). Mr. Haywood asked him whether there was anything Petitioner was really deeply involved with that would not allow him to work on the molybdenum project. (Ibid). Petitioner told him that he had a few small projects going on; but there

was nothing that was consuming a lot of his time and that he did have time to work on it. (Ibid.) Petitioner eventually called Mr. Haywood and told him that "now I'm available" (TR 154), and asked for the detail request. (TR 155 and JE 4A, ´8).

13a. On June 16, 1987, Petitioner had another meeting with Mr. Duffus. (PE 14). Also in attendance was E. Daniel Spengler, Jr., who is the Assistant Director for Human Resources in RCED. (TR 769). This meeting was to inform Petitioner that his 1986-1987 appraisal would not be modified on the basis of his written rebuttal; that RCED was actively reviewing its planned and ongoing assignments in the areas of responsibility of four associate directors to identify appropriate work for Petitioner in his role as RCED's mining engineer; that if a congressional committee requested the detail of a mining engineer, the request would be handled in the same manner as all other similar requests for details; and that he was not to engage in further outside employment or to provide briefings to the State Department without the express approval of RCED's Deputy Director for Operations or the Assistant Comptroller General, RCED. (PE 14 and TR 793-794).

b. Mr. Spengler was called into the meeting for basically two reasons -- "to provide any interpretation of the appraisal standards that was necessary or to provide advice, or whatever, as well as to inform [Petitioner] of any further appeals available to him if he wasn't satisfied with the results." (TR 794).

c. During the course of the meeting, Petitioner commented that he believed that a reason for his receiving a less than "exceptional" rating was that "RCED is retaliating against [him] because of the time and energies it expended in defending its position on his previous appraisal." (PE 14, page 1, ´3). (Petitioner's Exhibit 14 is a memorandum of the June 16 discussion prepared by Mr. Spengler and reviewed by Mr. Duffus.).

d. According to the memorandum, Petitioner also commented that "[h]e believes that Mr.Spengler and RCED will be retaliating against him if they do not approve a request for the detail of his services to a congressional committee (which he says has been received by GAO)." (PE 14, page 2, ´9).

e. Mr. Spengler explained to Petitioner the attitude of the division in regard to details to the Congress, as follows:

"I went into the line I guess I've already given you about how we discourage that sort of thing and he said but, Dan, you don't understand. They're not using me as I'd like to be used. At least somebody in the Federal Government would get a productive use of my time and services. You know, I'd like to go.

(TR 794). Mr. Spengler then explained to Petitioner how to optimize his chances of getting a congressional assignment, by having a name request for his services, and pointed out that name requests are "much harder to wiggle out of... ." (TR 795).

f. At the meeting, Mr. Spengler "told Mr. Duffus that he should continue to be aware of this problem [of Petitioner not having enough work to do] and to the extent possible, to direct work his way." (TR 809). He "impress[ed]" upon Mr. Duffus that he had "excess capacity" in Petitioner. (TR 808). Mr. Spengler reported this problem of Petitioner's lack of sufficient work to his immediate superior, Kevin Boland, Director of Operations, who also talked to Mr. Duffus and impressed upon him the need to keep employees occupied. (TR 809-810 and 397).

14a. The "customary practice in RCED with respect to detailing employees" was explained by Mr. Spengler. (TR 788). Details are "discourage[d]". (TR 788). The request comes in from a member of Congress and goes to the Office of Congressional Relations. (TR 789). That office determines which division has the people who might be able to address the issues. (Ibid.) Generally, the division tries to "wiggle out of all these requests." (Ibid.) This is because the division is authorized only so many staff years; and these do not include any numbers for designations to congressional details or for some other purpose. (Ibid.) The division has assignments in queue waiting for people to work on them, so it would rather keep its employees for its own work. (Ibid.) Thus, when a detail request comes in, the division's general reaction is "how are we going to get out of it." (Ibid.)

b. When detailed, the employee is still employed by GAO; but the details are "absolute" in terms of supervision. (TR 790). The division has had 80 or so such detailed employees in the past ten years. (Ibid.) The arrangement is that the detailed employees "become the exclusive use or property of the committees to which they are detailed ...." (TR 790-791). GAO does continue to support the detailees with salary, travel expenses, and time records. (TR 791). In infrequent cases, GAO also provides the detailees with office space. (TR 791).

c. RCED has never used a detailee to work on GAO jobs during the period of the detail. (TR 792).

15a.Pursuant to the request of Senator McClure, Petitioner was detailed to his staff, his detail running from July 6, 1987, until July 1988. (JE 4A, ´9). The detail came about after "almost a fight" which Petitioner had with his supervisors over his lack of work. (TR 151). At first, Mr. Spengler opposed the detail. (TR 155). After Petitioner told Mr. Spengler that he was going to write to the Senator and tell him what was going on at GAO, his detail was approved within 24 hours. (TR 155-156). [11]

b. Mr. Wilson did not appeal the detail of Petitioner to upper management, despite his apparent ability to do so. (TR 343). Mr. Wilson has never appealed a detail and could not imagine doing so, especially in Petitioner's case, where he was requested by name by a Senator and the detail was approved by the Assistant Comptroller General. (TR 34).

16. Mr. Spengler knew from Petitioner's files and from discussions with Mr. Boland that Petitioner was reclassified to Mining Engineer pursuant to "discussions about a settlement". (TR 815 and 813). Mr. Duffus had "a general awareness of a complaint that was filed by Mr. Rojas and resolved." (TR 607). Mr. Wilson knew that "as a result of a settlement in a previous case that Mr. Rojas had brought that he had been reclassified as a mining engineer out of the evaluator job series and that that is how he should be used." (TR 397). Mr. Wilson was so informed by his superior, Mr. Duffus, as well as in a meeting with Mr. Boland about the matter. (Ibid.)

17a. During his congressional detail, Petitioner worked directly for Carl Haywood, who supervised and rated his performance on the detail. (TR 645-646 and 172-173). The detail concerned a "very important and urgent matter." (TR 136-137).

b. During at least the first two months of the detail, near the time GAO began some preliminary work on the mining law job, Petitioner was completely occupied with his work on the detail. (TR 132-133, 385, 387 and 459). His work required him "to go very fast, and perform a big evaluation of the molybdenum industry...." (TR 132). Among other things, his work involved trips to the western United States, research at the Bureau of Land Management and libraries, and consultations with industry participants. (TR 132 and 134-135). Mr. Haywood hoped to have the work finished by June 1988. (TR 648 and 650).

c. Six-month details are the standard procedure between the Congress and GAO. (TR 692). Petitioner's original six-month detail was extended another six months because the work required more time. (TR 691-692).

d. It was not the intent of Mr. Haywood that Petitioner be detailed to the Congress on a full-time basis. (TR 650). However, there is no evidence that this limited need was ever relayed to any of Petitioner's supervisors at GAO. Mr. Wilson was not so advised. (TR 391). Nor did anyone from GAO inquire as to Petitioner's availability. (TR 691). During the detail, Petitioner admitted that he spent "very little" time at GAO. (TR 135). On the occasions when he went to his office at GAO, he worked on his detail assignment and Mr. Haywood would generally call him there, or at home, at least a couple of times a week. (TR 135 and 649). Petitioner spent periods of up to one week away from his GAO office. (TR 134). He was seldom, if ever, seen by Mr. Wilson (TR 391) or by the two assignment managers assigned by Mr. Wilson to the mining law job, Eugene E. Aloise (TR 471) and Mr. Aloise's successor, Robert E. Cronin. (TR 576). Throughout the detail, Petitioner was not available for full-time work on the mining law job, although he could have assisted from time to time, if GAO had asked. (TR 137).

e. Before going on the congressional detail, Petitioner was aware of the mining law job. (TR 157). During the detail, he never expressed a desire to work on the project to Mr. Wilson, Mr. Aloise or Mr. Cronin. (TR 391, 441-442, 461 and 590).

18a. Work on the mining law job began around September 1987. (TR 385). After 40 hours of staff work had been done on it, but under another job code (TR 387-388), a job code was assigned to the mining law job itself on October 15, 1987. (RE 9 and TR 387).

b. From October 19, 1987 to April 15, 1988, the survey[12] phase of the job was conducted. (RE 9 and TR 422-423, 454, 458-459 and 475).

c. Mr. Aloise, a GS-14 at the time, was designated as the assignment manager on the mining law job by Mr. Wilson. (TR 311). He received the assignment because he had been working on hardrock mining issues for about the previous six years (TR 311). Until 1983, most of these issues were "environmentally oriented". (TR 460). In working on these issues, Mr. Aloise has "never" requested technical professionals, such as specific kinds of engineers or scientists. (TR 486 and 487). He has a Bachelor of Arts degree in political science and economics and a Master's degree in public administration. (TR 476).

d. In 1988, Mr. Aloise was replaced by Mr. Cronin. (TR 459, 475 and 570-571). Mr. Cronin has a Bachelor of Arts degree in general studies and a Master's degree in finance. (TR 570). Mr. Cronin has had no experience working in a mine, and no GAO assignment involving mining or mining law or minerals prior to replacing Mr. Aloise on the mining law job. (TR 570).

19a. Mr. Wilson left the staffing of the mining law job to Mr. Aloise. (TR 329). Although Mr. Wilson could assign staff himself and has made suggestions that certain people be used on specific projects, he generally does not do so without a specific request from an assignment manager. (TR 329-330, and 430-432). Mr. Wilson could not recall consulting with Mr. Aloise on the possible use of Petitioner. (TR 431). Mr. Aloise has known Petitioner since 1979. (TR 459). Although Mr. Aloise had been doing all the hardrock minerals issues, and had daily conversations with Petitioner when they were working together at the same site, Petitioner never asked Mr. Aloise if he could work on one of Mr. Aloise's hardrock mining projects. (TR 459-461).

b. In staffing the mining law job, Mr. Aloise followed his customary procedure to determine who was available on his staff or what regions might be available, the nature of the job, and the locus of the work needed to be done. (TR 456, 463-464, 481 and 483). Based on these considerations, and on his knowledge of and past experience with the San Francisco Regional Office[13], Mr. Aloise referred the mining law job to the SFRO. (TR 456 and 463). There was no mining engineer in the SFRO. (TR 463). In Mr. Aloise's view, no mining engineer was needed on the survey phase. (TR 464 and 471). In assigning the mining law job to the SFRO, Mr. Aloise asked only "who's available." (TR 483). He "didn't ask for any particular expertise." (Ibid.)

c. Neither Mr. Wilson nor Mr. Aloise asked Petitioner to participate. (TR 338-340 and 470-471). Mr. Wilson explained that Petitioner was on detail to the Congress at the time the assignments were made and that the decision to detail him was made by upper management, considerably above him. (TR 338-341). Mr. Aloise could not recall, at the time he made his staffing decisions, whether he knew that Petitioner, some three years prior, had brought a discrimination complaint against some GAO officials. (TR 475). He denied considering Petitioner's race or national origin in making his staffing choices. (Ibid.)

d. Denis P. Dunphy, a SFRO employee, was selected by SFRO's Issue Area Manager, Jeff H. Eichner, to be the evaluator-in-charge of the mining law job. (TR 467 and 493). This was Mr. Dunphy's first exposure to hardrock mining issues. (TR 493). At the time of this assignment, he had had about 19 years of experience as a GAO evaluator. (TR 510). He holds a Bachelor of Arts and a Master's degree in business administration, and teaching credentials in horticulture from the State of California. (TR 491). He has taken no courses in engineering or geology. (TR 492) Before working on the assignment, he did attend a two-day class conducted by mineral lawyers in Reno, Nevada, that he testified "was sort of a primer for the 1872 Mining Law." (TR 493).

e. Assigned to work with Mr. Dunphy were two staffers in the SFRO, Tom Cox and Julie Devault. (TR 494). Mr. Cox was a GS-12 evaluator. (TR 496) Ms. Devault was relatively new in the office and was "developmental level staff on really her first assignment."(TR 494). From RCED, in Washington, D.C., Delores Parrett, a "recently-new" evaluator, was assigned to the mining law job. (TR 362). A report editor in SFRO also had some input. (TR 494).[14]

f. Mr. Dunphy was of the opinion that the mining law job did not need the assistance of a mining engineer and testified that: "The choice wouldn't be mine to assign him but I certainly wouldn't have requested a mining engineer." (TR 505 and 506). He first met Petitioner around August 1988. (TR 504 and 528).

g. A manual entitled Government Auditing Standards was offered into evidence by Petitioner as a generally accepted manual with which everyone at GAO was familiar. (TR 90-91) The manual states that "the staff assigned to conduct the audit should collectively possess adequate professional proficiency for the tasks required." (PE 1, §3-1 and TR 92). Respondent refers to the manual as the "Yellow Book". (TR 92 and RBr 35, footnote 17).

20. As evaluator-in-charge, Mr. Dunphy had charge of the overall assignment on a day-to-day basis. (TR 492). He worked on a daily, or at least weekly, basis with the assignment manager in Washington, first Mr. Aloise and then Mr. Cronin. (TR 494). Mr. Dunphy's role was to develop the issues, to prepare the audit guidelines to meet the objectives of the congressional request, and to assure that the guidelines were properly carried out. (TR 492). He also had responsibility for the working papers and to review the work of the junior staff. (Ibid.) He attended all major meetings such as the opening and exit conferences at the headquarters level. (Ibid.) He had overall responsibility for writing the first draft of the mining law report.

(TR 468, 492, and 495).

21a. At two stages during the mining law job, GAO evaluators utilized non-GAO persons familiar with mining. (TR 469-470 and 511-517). One was a mining engineer; some others also might have been mining engineers. (TR 497). At both times, however, GAO contacted these individuals for reasons that did not primarily relate to their technical mining expertise. (Ibid.)

b. On the first of these occasions, which was during the survey phase of the job, Mr. Dunphy consulted with James Evans, a mining engineer. (TR 497 and 512). At this early stage of the project, GAO was interested in reviewing certain assessment affidavits filed with BLM. (TR 469-70). Assessment affidavits are filed annually by holders of mining claims to certify that the required development work has been performed on their claims. (JE 1, page 11). GAO also wanted to learn how BLM handled these affidavits. (TR 512-513). Mr. Dunphy contacted Mr. Evans because he was the BLM spokesperson on the question of how BLM maintains and interprets annual assessment affidavits. (TR 511-513).

c. The second occasion for GAO's communications with non-GAO persons who had expertise in mining occurred during the review phase of the mining law job, which began in April 1988. (RE 9, page 1 and TR 572-573). These communications occurred in connection with visits by GAO staff to selected sites of patented lands and claims for which patent applications had been filed. (TR 514-516). GAO made these visits "to get a feel for the value" of the land. (TR 498). On these visits, GAO was accompanied by officials of BLM and the National Forest Service[15] who had "expertise... in mining", but whose "expertise" was not the "primary purpose" for accompanying the GAO team. (TR 514-517). The BLM and NFS employees who accompanied the GAO team on these site visits were responsible for administering the Mining Law of 1872 with respect to the sites; they knew where the sites were located; and they were familiar with the owners and could introduce the GAO team to them. (TR 514-517).

22a. Near the end of the survey phase of the mining law job, in approximately March of 1988, Mr. Cronin took over as assignment manager. (TR 571-572). The field staff in the SFRO had already been assigned (TR 571) and was completing the selection of the sites to be visited. (TR 573). Work left to be done involved site visits, interviews, and interview write-ups. (TR 573-587).

b. Mr. Cronin first met Petitioner in the summer of 1988. (TR 589) He did not learn of Petitioner's 1985 discrimination complaint until shown the Petition for Review in this case. (TR 589-590).

23a. Petitioner returned from his congressional detail in mid-July of 1988. (JE 4A, ´9 and TR 151). At this time, the review phase of the mining law job "was virtually complete" and all that remained was to draft the report. (TR 588). Mr. Wilson told Mr. Cronin that Petitioner was back from his congressional detail and asked: "[I]s there anything that you can see that [Petitioner] might be able to do at this point on the mining law job [?]" (TR 346 and see also TR 392-393 and 588). Mr. Wilson had control of the staff in Washington. (TR 581). Mr. Cronin could just ask for staff. (TR 587).

b. Mr. Wilson and Mr. Cronin mutually agreed that "the job was so far along, the job was essentially over. That there was little, if anything, that [Petitioner] could contribute at that time." (TR 346). Mr. Cronin testified that: "It was not obvious to me how anyone else who had not been involved in the audit work was going to be able to help in the drafting process." (TR 588 and 595).

c. Mr. Cronin did ask Petitioner to review some documents that would give him an idea of what the team was doing, "in anticipation that something might come up down the line". (TR 588). Petitioner spent 12 days on this review. (Ibid.)

d. Following his return from his congressional detail, Petitioner was not given much to do; and there was a time when he "wasn't working on anything." (TR 81-82). His performance appraisal by Mr. Wilson for the period from June 16, 1988, to June 15, 1989, contains a comment: "There was a limited demand for the mining engineering expertise during this year." (PE 12). GAO's work assignment records, by job, show Petitioner credited with working only 70 days during the year following his return from his congressional detail in mid-July 1988. (RE 9, 10 and 11). In addition to these 70 days shown on the work assignment records, Petitioner worked a "bit" for Mr. Haywood by providing him with information and records. (PE 12, page 1 and TR 151, 840-841 and 392-397). Mr. Cronin did offer to Petitioner a job concerned with the potential environmental consequences of cyanide mining in Alaska. (TR 591). Petitioner declined the job and advised Mr. Cronin that: "[T]hat was more like audit work that [Mr. Cronin] should be doing ...." (TR 591).

24. In the normal course of business, the audit team, headed by the evaluator-in-charge, is responsible for a first draft of the report on a job. (TR 495-496 and 510 and RE 13). Following standard procedure, the SFRO wrote the first draft of the Mining Law Report. (TR 495). The SFRO submitted this draft to the assignment manager, Mr. Cronin, for his review. (TR 496-497). From Mr. Cronin, the draft went up through RCED to Mr. Wilson, who reviewed and processed it through normal channels to Mr. Duffus for final approval. (TR 496-497, 595 and 601-602). The draft also was submitted, for legal review, to Stan Feinstein, an attorney in GAO's Office of General Counsel who has had extensive experience in mining law. (TR 447 and 581-582).

25. At the time the Mining Law Report was drafted and reviewed, it was not the customary practice of Mr. Wilson's group (NRM) to circulate a draft report to a specialist for review and comment. (TR 440 and 595). This routine changed in late 1989, when Mr. Wilson initiated a practice whereby specialists, including Petitioner, are asked to review and comment on the technical aspects of draft reports. (Ibid.)

26a. The Mining Law Report was sent to Congressman Rahall on March 10, 1989. (JE 1). It recommended certain changes in the Mining Law of 1872 and evoked immediate controversy, particularly from the mining industry, but also from BLM. (TR 532-536 and PE 4a-d). BLM criticized the report for such things as "faulty analysis", lack of objectivity, and "bias." (PE 4d, page 3). Mr. Cronin reviewed the criticisms by the American Mining Congress.[16] (TR 579). Over a period of weeks, so did Mr. Dunphy. (TR 524) Mr. Duffus, alerted to possible errors in the report by Petitioner, told Mr. Wilson "to try and get a better handle on the problems and concerns the [Petitioner] had at the time...." (TR 606). A report refuting the allegations of errors was prepared by GAO. (RE 12). GAO also had to respond to a number of congressional criticisms of the report. (PE 7, 8, 9, 10 and 16).

b. Sometimes GAO allowed Petitioner to read reports just before publication or transmission to the subject agency for comment. (TR 83). The Mining Law Report, however, was not shown to him before publication. (Ibid.) He did read it, on his own, and immediately contacted management saying that "we had problems." (TR 82). Mr. Duffus regarded the problem which Petitioner gave as an example as "not significant". (TR 606). This problem was the misnaming of a piece of equipment and indicating that unnecessary damage was done to land. (TR 83-84). In fact, the disturbing of the land was necessary in order to obtain a sample for analyzing. (TR 84). Mr. Cronin admitted that the piece of equipment was

misnamed. (TR 578).

Up until August 22, 1992, Petitioner's family had a mining relationship with AMAX, which has mining interests in Idaho. (TR 690 and 855-860). AMAX is a member of the AMC, which is "adamantly opposed" to legislation to overhaul the mining law and criticized the Mining Law Report. (TR 553-555). In the Yellow Book on auditing standards, managers and supervisors are advised, in assigning staff to an audit, to be alert to personal relationships that may "weaken or slant audit findings in any way." (PE 1, 3-6, ´16).

c. Mr. McCullough, who retired from GAO in about 1983 (TR 631), read the report and opined that this was the type of assignment on which Petitioner should have been used.(TR 626). His criticisms of the report included a lack of objectivity on the part of the authors (TR 637) and a lack of understanding of mining law. (TR 627).

d. Senator McClure asked his legislative assistant, Mr. Haywood, to review the report. (TR 656). Mr. Haywood grew up in a mining town, has a degree in forestry, and has been involved with natural resource issues for over 20 years. (TR 643). He has a good working knowledge of the Mining Law of 1872. (TR 656). He criticized the report as having, at best, "a lot of misleading" and, at worst, "outright false information." (TR 657-658). He opined that anyone who had worked in the mining business would have spotted these faults from the beginning. (TR 671). Mr. Haywood is a friend of Petitioner. (TR 690).

e. John Leshy was called as a witness by Respondent and he opined that the report is "basically an accurate review and discussion" of the Mining Law of 1872. (TR 715). He found a few, inconsequential errors. (TR 751-752). Mr. Leshy is Special Counsel to the House Interior and Insular Affairs Committee, on leave from his faculty position at the Arizona State University College of Law. (TR 711). He has never worked with a mining engineer, but has visited some mine sites. (TR 763). His familiarity with the Mining Law of 1872 goes back 20 years (TR 713). He has taken no course in mining, minerals, or mining law. (TR 744). He has written a book on mining law that was published in 1987. (TR 714). The book was funded and published by a natural resource policy group. (TR 742). For nearly five years, he was affiliated with the Natural Resource Defense Council, the first major national environmental advocacy group, which did oppose certain features of mining law, such as the patenting provision. (TR 740-741). He has also been on the Board of Directors of Grand Canyon Trust, another environmental advocacy group. (TR 742). Members of the GAO team visited him while they were doing some of the field work on this report. (TR 749). For about an hour or so, they sat in his office at Arizona State University College of Law "just really sort of shooting the breeze about the mining law." (TR 749-750).

f. Koehler Sheridan Stout was called as a witness for Petitioner. He opined that "the authors of this report demonstrate a lack of understanding on many basic concepts underl[y]ing the Mining Law of 1872." (TR 196-197). In his professional opinion, the mining law job required mining expertise. (TR 198). Dr. Stout has been a mine foreman and superintendent, and has done a lot of consulting work dealing with mining. (TR 198). He is a mining engineer, a lawyer, and a retired professor and associate dean of the Montana College of Mineral, Science and Technology. (TR 190-191). He was admitted to be an expert on the question of what is mining engineering and the Mining Law of 1872. (TR 191). Dr. Stout was paid for his testimony. (TR 236). In his consulting business, he works primarily for small miners and hobby miners. (TR 237). He also has an equity in one small mine. (TR 255). He testified that the reason he considers certain recommendations in the Mining Law Report to be "errors" is that, if those recommendations were to be adopted, it would "put at least 80 percent of them [the small miners and prospectors] out of business." (TR 252 and 237). Dr. Stout disagreed with Mr. Haywood over whether posting signs qualified

as meeting the law's requirement that $100 worth of work must be done yearly in order to preserve rights to mining claims. (TR 675-676 and 219).

g. Loren Setlow, a senior geologist who has been employed at GAO for nine years (TR 273-274), reviewed the Mining Law Report once "on his own volition, just to take a look at the report to see what the controversy was about." (TR 282). He reviewed it a second time in a GAO course that was given on "message development and report writing" a few months ago. (TR 282). Mr. Setlow noted a number of what he judged to be errors of a technical nature. (TR 283-288, 294-297, 300). Mr. Setlow has worked with Petitioner on a number of projects. (TR 276). He is sure that Petitioner would have found the same errors he did because of Petitioner's perspective in mining, namely that he had been employed by the BLM where he was involved directly in evaluations of mining claims and patents; had gone though the BLM school in mineral appraisals; and had had actual work experience in mines. (TR 301). He answered affirmatively the question of whether Petitioner's point of view about mining was "pro-mining". (TR 301).

27. Mr. Setlow was born in Atlanta, Georgia. (TR 290 and 302). Like Petitioner, he has been a GS-14 or Band II[17] specialist at GAO for a number of years. (TR 272-273). Like Petitioner, he criticized the manner in which GAO treats specialists. (TR 71 and 305-306). GAO itself has conducted a study of specialists and how they are treated at the agency. (TR 306). GAO found that its managers "don't provide the promotion potential. They don't provide the work environment and the opportunities for those people to perform their work in an appropriate manner." (TR 306). This study was conducted about two or so years ago. (TR 307). Although Mr. Setlow has received at least one outstanding performance appraisal, in 1989 (TR 292), he has given up seeking a promotion. (TR 291). GAO's response has always been that "they would have to go through a needs determination." (TR 291).

28. The needs determination is a yearly formal process followed by GAO since at least 1983. (TR 778). It is a long process, an exercise whereby GAO looks at its workload requirements, how they have changed from year to year, the skills needed, and budgetary ceilings. (TR 777). In considering a request for a specialist at a specific band, the management group assigned to make the needs determination considers that specialists are less fungible than generalist evaluators. (TR 781). In order to recommend the promotion of a specialist, the need for the specialist at the requested band must appear to be a continuing one. (TR 781-782). At present, RCED employs 42 specialists. (TR 788). Of these, 12 are at Band III, 28 at Band II, and 2 at Band I. (TR 787-788).

29. RCED never has seen the need for a Band III mining engineer and, thus, there has never been a Band III mining engineer position available for which Petitioner could have applied. (TR 787). Nor has there been a need for a Band III geologist position for which Mr. Setlow could have applied. (TR 787). During the last promotion cycle in RCED, three Band III positions were open for competition. (TR 782). None was a specialist position. (TR 783). There were approximately 200 employees eligible for the three positions. (TR 782-783).

30. Every year since at least 1986, Petitioner affirmatively has refused to be considered for promotion to a Band III evaluator because it is not a specialist position. (RE 3 and TR 141). He did seek promotion to some Band III position other than evaluator. (TR 150).

31. Unlike Petitioner, who is faced with a diminishing workload (TR 67 and 69-70), Mr. Setlow has an abundance of work. (TR 281). Mr. Setlow obtains his assignments in several ways, from looking at the annual work plan, from contacting and being contacted by other assistant directors or directors both within and without his division, and through his "network", using it to contact various assistant directors or

directors. (TR 279-28). Petitioner is discouraged from maintaining a "network" whereby he seeks out jobs on his own. (TR 280). Petitioner was told by Mr. Wilson that it would be "better" if he, Mr. Wilson, looked for jobs for Petitioner. (TR 847). Mr. Wilson does give Petitioner a copy of the annual work plan for NRM and asks Petitioner to make a list of the jobs he could work on. (TR 842-843). Petitioner makes up such a list and "that's the last [he] hear[s] of the list." (TR 843). Mr. Duffus, at a June 10, 1987, meeting, told Petitioner that he, Mr. Duffus, would check around to see what he could do about providing work for Petitioner. (TR 846). Ordinarily, Mr. Duffus does not involve himself in staffing decisions on jobs; he relegates this task to his assistant directors. (TR 604).

32. Petitioner believes, from reviewing reports published over the past years, that there were seven jobs to which he could have applied his expertise, but to which he was not assigned. (TR 824 and 827-828). One of the seven was the mining law job. (TR 827-828).

33. Unlike Petitioner, Mr. Setlow has never told the people for whom he works that he did not want to do evaluator work. (TR 293).

34. During the processing of Petitioner's charges of discrimination and retaliation now pending before this Board, the counselor in GAO's Civil Rights Office noted only one reason given by Respondent for its non-assignment of Petitioner to the mining law job. (PE 6 and TR 265-266). That reason was given by Mr. Duffus and Mr. Boland as: "Mr. Rojas was not assigned work on the mining law report because the assignment concerned legal questions and evaluation and did not require the expertise of a mining engineer." (TR 265-266). At pages 2 and 25 of its Post-Hearing Brief, Respondent has expanded its one reason to two. The leading reason is now that: "Mr. Rojas was not available to work on the job." (RBr pages 21 and 25).

35. Mr. Wilson, Mr. Duffus, Mr. Aloise and Mr. Cronin were all born in the United States. (Tr. 439, 474, 592-593 and 601).

IV. LEGAL STANDARDS FOR ANALYSIS OF PETITIONER'S CLAIMS

Subsection 703(a) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§ 2000e et seq. (1982) makes it unlawful for an employer to discriminate against an employee because, inter alia, of the employee's race or national origin. Id. at §2000e-2(a). Title VII also makes it unlawful for an employer to discriminate against an employee because that employee opposed a practice prohibited by Title VII. Id. at §2000e-3(a).

These Title VII provisions are made applicable to GAO employees pursuant to §3(g)(3) of the GAOPA.

Allegations of employment discrimination and retaliation must be proved by a preponderance of the evidence, which is defined as "that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true." 4 CFR §28.61 (a)(2) and (d).

The standards governing the order of presentation and allocation of proof in an employment discrimination action involving a single individual were set forth by the Supreme Court in the benchmark cases of McDonnell Douglas v. Green, 411 U.S. 792 (1973), involving a refusal to rehire an employee, and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), involving a terminated employee. Adapting the standards in these cases to the situation here, a failure to assign work, the

individual plaintiff (here Petitioner) must show, in order to establish a prima facie case, that: (1) He is a member of a protected class; (2) He was qualified and available for assignment to a project for which the employer (here Respondent) was seeking applicants; (3) Despite those qualifications, he was rejected; and (4) After the rejection, the position remained open and Respondent continued to seek applicants from persons with Petitioner's qualifications, or Respondent assigned someone with similar qualifications to the project.[18] This burden is not intended to be an "onerous" one. Burdine, 450 U.S. at 253.

By thus establishing a prima facie case, Petitioner "eliminates the most common nondiscriminatory reasons" for the challenged action. Burdine, id. at 253-254. Once a prima facie case has been made, a presumption of discrimination is made which Respondent can rebut by "articulat[ing] some legitimate, nondiscriminatory reason" for the challenged action. McDonnell Douglas, 411 U.S. at 802. "Defendant's burden is one of production, not persuasion." Oliver v. Digital Equipment Corp., 846 F.2d 1-3. 108 (1st Cir. 1988), citing Burdine, 450 U.S. at 254-255. "[T]he defendant's explanation of its legitimate reasons must be clear and reasonably specific." Burdine, 450 U.S. at 258.

If Respondent successfully meets its burden of production, Petitioner may still prevail by showing that Respondent's proffered reason is, in fact, a pretext for discrimination. Burdine, 450 U.S. at 256. Petitioner "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Ibid. At this stage, Petitioner's burden of showing pretext merges with his ultimate burden of proving intentional discrimination. Ibid.

In all cases of individual employment discrimination, motivation and intent are the ultimate issue. The court will inquire into whether the presumptively valid reasons for Petitioner's denial of assignment were in fact a cover-up for discriminatory decisions. McDonnell Douglas, 411 U.S. at 804-805. Intentional discrimination might be established by demonstrating that Respondent treats some people less favorably than others; discriminatory motives may sometimes be inferred from the mere fact of differences in treatment. Teamsters v. United States, 431 U.S. 324, 335 fn.15 (1977).

"The order and allocation of burdens of proof in retaliation cases follow that of general disparate treatment analysis as set forth in [McDonnell Douglas and Burdine]." Sumner v. United States Postal Service, 899 F.2d 203, 208 (2nd Cir. 1990); and see also Chen v. General Accounting Office, 821 F.2d 732, 738 (D.C. Cir. 1987). In order to make out a prima facie case of retaliation, Petitioner must show that: (1) He engaged in protected activity of which Respondent was aware; (2) A personnel action adverse to Petitioner followed the protected activity; and (3) There was a causal connection, or nexus, between the adverse personnel action and the protected activity. Id at 739. See also Johnson v. Palma, 931 F.2d 203, 207 (2nd Cir. 1991). The causal connection, or nexus, can be established indirectly with circumstantial evidence, by showing that an adverse action "closely follow[ed]" the protected activity (Johnson, 931 F.2d at 207 and Chen, 821 F.2d at 739) or through other evidence such as disparate treatment of employees who engaged in similar conduct as Petitioner, or directly, by showing evidence of retaliatory animus on the part of Respondent. Johnson, 931 F.2d at 207 and Samuelson v. Durkee/French/Airwick, 760 F.Supp. 729, 739-740 (N.D. Ind. 1991). Retaliatory animus may be inferred from a showing that a relatively short period of time elapsed between the protected activity and Respondent's alleged retaliation. Oliver, 846 F.2d at 110 and Samuelson, 760 F. Supp. at 739-740.

If Petitioner succeeds in establishing his prima facie case, the burden of production shifts to Respondent to articulate, through admissible evidence, a legitimate nonretaliatory reason for the taking of the adverse personnel action. Should Respondent carry this burden, Petitioner can succeed only by proving that Respondent's articulated reason is pretextual. Sumner, 899 F.2d at 209.

The critical factual inquiry and the ultimate question in both discrimination and retaliation cases is whether the Petitioner has proven by a preponderance of the evidence that Respondent intentionally discriminated or retaliated against Petitioner because of Petitioner's protected status under Title VII or because Petitioner engaged in protected activity. Ibid and U.S. Postal Service Bd. of Govs.v. Aikens, 460 U.S. 711, 715 (1983).

In Aikens, the Supreme Court admonished lower courts that, once a Title VII case has been "fully tried on the merits", the question of whether a plaintiff has established a prima facie case "is no longer relevant" and that they should not make the inquiry into the ultimate question of fact "even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and order of presentation of proof'," quoting Burdine. Aikens 460 U.S. at 715-716. See also Mitchell v. Baldrige, 759 F.2d 80, 83-84 (D.C.Cir 1985) applying the Aikens advice.

V.DISCUSSION AND CONCLUSIONS

Applying the above legal standards to the evidence of record, the Board concludes that the Petition for Review must be dismissed for failure to prove, by a preponderance of the evidence, that any of the business reasons adduced by Respondent is pretextual. In so concluding, the Board has assumed, arguendo, that a prima facie case was established by Petitioner and that the credibility issue set forth in footnote 10, supra, would have been resolved in favor of Petitioner.

Because Petitioner places the 1987 Mining Law job "at the center of the gravamen of this case" (FOF 8c), the Board focuses on this job and Petitioner's exclusion from any substantive work on it.[19]

The business reasons asserted by Respondent for excluding Petitioner from all but 12 days on this job are twofold-- Petitioner was not available to work on it; and Petitioner, a mining engineer, was not needed on it. Facially, these business reasons appear to be nondiscriminatory and reasonable.

The not-available business reason

As for the first argument, availability, the evidence is persuasive that Petitioner was not available to work on the Mining Law job from its inception, around September 1987 when he was on a congressional detail, up until his return from his congressional assignment in July 1988.

The relationship of GAO to the Congress of the United States is such that when Congress asks for the detail of personnel, it is most difficult to "wiggle out" of such requests, although GAO tries. See FOF 14a. When the Congress names a specific GAO employee, it is "much harder to wiggle out of" the request. See FOF 13e. Petitioner apparently negotiated for himself just such a name request. See FOF 12. Mr. Wilson, who had the ultimate responsibility for staffing the job, understandably felt helpless to challenge the detail because it came from a United States Senator, named Petitioner as the employee the Senator wanted for the detail, and the detail was approved by upper management at GAO. See FOF 15b.

Once an employee is detailed to Congress, GAO continues to service the employee for routine matters such as pay, leave and travel, but it exercises no supervision or control over him. See FOF 14b. RCED has never used a detailee to work on GAO jobs during the period of the detail. See FOF 14c.

The lack of pretext in the business reason for not utilizing Petitioner on the mining law job, while he was on his congressional detail, is reinforced by the fact that no one, including Petitioner, advised any GAO supervisor that Petitioner was not being kept fully occupied on the congressional detail and could have helped out on GAO jobs on a part-time basis. See FOF 17d.

Admittedly, the credibility of Respondent's reliance on non-availability as a business reason suffers somewhat from the fact that Mr. Duffus and Mr. Boland never articulated that reason while Petitioner was processing his administrative complaint. See FOF 34. Some courts have held that an employer's articulation of one reason for its action at one stage of a proceeding, followed by a later, contradictory proffer of justification, is evidence of pretext. See, e.g., Tye v. Board of Educ. of Polaris Jnt. Voc. Sch. Dist., 811 F.2d 315, 320 (6th Cir.1987) and Alvarado v. Board of Trustees of Montgomery Community College, 928 F.2d 118, 122-123 (4th Cir.1991). Here, however, the reasons are not contradictory. The not-available argument applies to a major portion of the job, as discussed above. The not-needed argument applies to the rest of the job, as will be discussed below.

The not-needed business reason

Obviously, the previously discussed, not-available argument became inapplicable when Petitioner returned from his Hill detail in July 1988. The work on the mining law job was still ongoing and was not finished until the publication of the Mining Law Report in March 1989. See FOF 23a and 26a. Even after publication, the staff was kept busy answering congressional criticisms of it. See FOF 26a. Preparing responses to congressional inquiries regarding reviews related to mining engineering is part of Petitioner's job description. See FOF 6c.

From July 1988 to July 1989, Petitioner's availability for any work is apparent from the fact that he put in little more than 70 days of work during this entire period. The failure to assign Petitioner more work might be considered as some evidence that the claims of discrimination and retaliation were meritorious, were it not for other evidence; namely that work for a mining engineer has been scarce in the last decade or so and Petitioner refuses jobs that involve evaluator-type work, of which there is plenty. See FOF 4, 6a, 10 and 23d.

Whether Petitioner was "needed" on the mining law job when he returned from his congressional detail is somewhat more difficult to decide. The field work was almost over and the drafting of the report was about to begin. See FOF 23b. As Petitioner had not participated in the field work, it was reasonable for management to decide that there was little contribution he could make at that stage of the project. See FOF 23b. Counsel for Petitioner conceded that the assignment was a "review of the law and not of mining engineering principles". See FOF 8c. A reading of the Mining Law Report confirms this concession. Although Petitioner was familiar with mining law (FOF 1), it is not clear from the record that his supervisors were aware of this.

Witnesses with credentials in mining and minerals testified that Petitioner should have been used on the team (Mr. McCullough), that the report showed a lack of objectivity and understanding of the Mining Law (Mr. McCullough), and that there were technical errors in the report which Petitioner would have caught (Mr. Setlow). See FOF 26c and 26g. Their testimony has been given particular weight because neither Mr.

McCullough nor Mr. Setlow was shown to have any personal or financial interest in the recommendations contained in the report, unlike other witnesses with such credentials, all of whom were shown to have some potential bias. See FOF 26b, 26d, 26e, and 26f.

Because of his family's mining interests (FOF 26b and 1), Petitioner could be said to have had too much of a personal involvement or bias to be on a team reviewing requirements of the Mining Law to determine whether it was consistent with current natural resources policies. See FOF 8c. The Yellow Book[20] containing auditing standards cautions supervisors and managers about putting such employees on an audit. See FOF 26b. However, since GAO does not give this as a reason for excluding Petitioner from the mining law job, the Board does not consider it in reaching its conclusions.

Once the review process of the draft report began, it would have been helpful to involve Petitioner to check for technical errors. However, at the time the draft of the Mining Law Report went through the review process, it was not the customary practice to circulate a draft report to a specialist for review and comment. See FOF 25. Perhaps in response to the furor created over the Mining Law Report, this practice has been wisely changed. See FOF 25.

Petitioner alleges pretext based on the evidence that Stan Feinstein, an attorney in the Office of General Counsel and not a member of the audit team, was asked to review the draft report and provide his opinion whereas Petitioner, who was familiar with mining law, was not. See PBR 18. Mr. Feinstein was knowledgeable about the mining law. See FOF 24. In view of the fact that the report contains recommendations on amending a law, it would have been irresponsible had GAO not subjected the report to the scrutiny of its legal staff. Because Petitioner does not count a law degree among his many credentials (FOF 1), the Board does not consider this evidence to establish pretext.

Petitioner also alleges pretext based on the evidence that mining engineers were consulted by the team on several occasions. See PBr 15. These consultations, however, took place during the field work on the project, at times when Petitioner was on his congressional detail and considered by GAO, with good reason, to be unavailable. See FOF 21a, 21b and 21c. Furthermore, the mining engineers contacted were employees of BLM and NFS and were contacted primarily because they knew the site locations to be visited by the team, could find them, and could introduce the team members to the land owners of the sites. See FOF 21.

Petitioner also alleges pretext in GAO's argument that the SFRO had a highly qualified team of evaluators on the assignment. See PBr 17. Petitioner notes that the assignment manager did not ask for high qualifications or special expertise, but only for whomever was available, and whatever qualifications the team members had were coincidental. In fact, the evaluator-in-charge had about 19 years of experience as an evaluator when assigned to the job. See FOF 19d. In any event, this argument does little to prove that Petitioner, a mining engineer, was needed for a job that involved a review of the law and not mining engineering principles. See FOF 8c.

The only evidence of record that might conceivably be claimed to indicate malice towards Petitioner is the disputed statement by the Assistant Director for Human Resources that he would oppose a congressional detail for Petitioner even though Petitioner had no work to perform at GAO. See footnote 10, above. (As aforesaid, the Board is assuming the truth of this statement, for purposes of this Decision.) However, the record shows that Petitioner was allowed to go on this detail and that, in any event, the Assistant Director had no line authority over Petitioner. See FOF 15a and footnote 10. Furthermore, the Assistant Director actually tried to be helpful to Petitioner--by explaining to him how to optimize his chances for a

congressional detail; by informing upper management of the problem Petitioner was having with the lack of sufficient work; and by impressing upon Petitioner's second-line supervisor the need to find more work for him. See FOF 13f. The totality of the evidence, therefore, does not paint a picture of managerial malice towards Petitioner.

The Board also takes note of the fact that, after Petitioner filed his discrimination complaint, GAO allowed Petitioner to go on his first congressional detail and, upon his return, assigned him to a job which even Petitioner praises as the best one he ever had. See FOF 5 and 7. These circumstances too negate any inference of malice borne by GAO against Petitioner because he had filed a complaint against it.

The Board also observes that none of the supervisors against whom Petitioner charged discrimination had anything to do with his exclusion from the mining law job. See FOF 9, 16, 19c and 22b.

What clearly filters through the record in this case is that Petitioner was treated just about the way the other specialists at GAO have been treated--they have little promotion potential and little opportunity to perform their work in an appropriate manner. See FOF 27, 28 and 29. Being an evaluator, rather than a specialist, appears to be the career path to Band III promotions; and Petitioner removed himself from this path. See FOF 6a and 20.

In one respect, Petitioner has been treated differently from other GAO specialists. The GAO geologist is allowed to find work for himself, through networking; whereas Petitioner had been discouraged from so doing. See FOF 31. Whether this unequal treatment is the reason Petitioner has little work is unclear. An equally plausible reason is that the geologist does not spurn evaluator-type work; whereas Petitioner does, as is well known by Petitioner's supervisors. See FOF 6a, 6b, 16 and 23d.

Considering all Petitioner's allegations of pretext in the light of the record and as discussed above, the Board is unconvinced that Petitioner has met his burden of proof in this case by a preponderance of the evidence.

Accordingly, it is hereby ORDERED that the Petition for Review be DENIED.

Separate statement of Administrative Judge Paul A. Weinstein:
Although entitled to participate in this en banc decision, I have decided not to do so because I was the author of the Initial Decision.

Notes

1. Paul A. Weinstein made the decision to abstain from participation in the en banc decision because he was the author of the Initial Decision.

2. Hereinafter, "NRM."

3. Hereinafter, "RCED."

4. Hereinafter, "GAO."

5. Petitioner’s claim of age discrimination was dropped prior to the hearing on the merits of this case. See TR 60.

6. The record in this case does not reveal how the issue of national origin was added to this case. The Petition for Review does not allege such a basis of discrimination. However the post hearing briefs of both parties refer to it as an issue. See PBr 3 and RBr 1. Thus it seems that the parties did agree to try the case on the issue of national origin.

7. These findings are based upon the stipulations of the parties (Joint Exhibit 4A), uncontested testimony, and the exhibits. The Petitioner’s exhibits will be referred to as "PE". The Respondent’s exhibits will be referred to as "RE". The joint exhibits will be referred to as "JE". The transcript will be referred to as "TR". The posthearing brief of Petitioner will be referred to as "PBr". The posthearing brief of Respondent will be referred to as "RBr".

8. Hereinafter, "BLM".

9. Hereinafter, "E&M".

10. At the hearing the terms "auditor" and "evaluator" were used interchangeably. The term "evaluator" will henceforth be used in this decision to refer to the position of auditor/evaluator.

11. Petitioner also testified that Mr. Spengler told him that he was "going to be kept at GAO without work, and [Petitioner] was not going on detail. And if [Petitioner] were to be asked for by name, he would oppose it." (TR 155). Mr. Spengler denied telling Petitioner that he "would not allow him to go on a detail even if he didn’t have any work to do in RCED." (TR 796). Mr. Spengler also explained that that was not a position he could take anyway, as he has no line responsibilities. (Ibid.)
This credibility issue was not resolved in the Initial Decision. Because its resolution is not critical to a decision in this case by the Board, the case will not be remanded to the Administrative Judge for a credibility determination.

12. The "survey" phase of a job, also called "scoping", is to develop the issues. (TR 458). The "audit guidelines" come out of the scoping. (TR 480-481). Then the "review" phase starts. (TR 484-485). The review phase is also referred to as the "audit" phase. (RBr 12, ´ 13).

13. Hereinafter, "SFRO".

14. Although Petitioner, at page 12 of his Post-Hearing brief refers to these employees assigned to the mining law job as "non-Hispanic and non-Chilean", no citation to the record supports this statement; and no evidence of record can be found to support it.

15. Hereinafter, "NFS".

16. Hereinafter, "AMC".

17. Both the Petitioner and Mr. Setlow are now Band II employees under a new system of grade structure put in place by GAO in 1989. (TR 818-819).

18. The record does not indicate the race and national origin of the persons assigned to the mining law job. However, even if those persons were of the same protected class as Petitioner, these facts would weaken, but not necessarily eliminate the prima facie inference of discrimination under the McDonnell Douglas-Burdine formulation, according to some courts. See Hornsby v. Conoco, Inc., 777 F.2d 243, 246-47 (5th Cir. 1985); and Meiri v. Dacon, 759 F.2d 989, 995-96 (2nd Cir. 1985).

19. Although Respondent, in its Answer to the Petition for Review, asserts untimeliness as an affirmative defense to all projects from 1986 to 1988, it makes no mention of this issue in its Post-Hearing Brief. Therefore, the Board joins Respondent in ignoring it.

20. In footnote 17 of its Post-Hearing Brief, page 35, GAO disavows the binding effect of language in the Yellow Book and cites Roberts v. GAO, 2 PAB -- (July 26, 1990) in which an administrative judge and member of this Board found GAO's BARS manual not to be binding or mandatory.
While the Board is not called upon in this case to decide the binding nature of any language in the Yellow Book, it does deem it to be appropriate to remind GAO that the Roberts case was pending before this Board on a Petition for Reconsideration when GAO mooted the matter by settling the case. Thus, the Roberts decision never became a final decision of this Board. The Board also reminds GAO that in two other decisions, which did become final Board decisions, portions of the BARS Manual were held to be binding and conferring rights upon GAO employees. These cases are: Shirley E. Hendley v. GAO, 2 PAB -- (November 19, 1990); and Fred Jiminez v. GAO, 1 PAB 563 (1988).
GAO's continued reliance upon Roberts, a decision which never became a final Board decision, is puzzling, to say the least.